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82-1903

CASE #_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHARLES WILLIAM O'BRIEN, Petitioner

v.

WILCOX & SCHLOSSER CO., L.P.A., Respondent

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES SUPREME COURT

FROM THE

SUPREME COURT OF OHIO

CHARLES WILLIAM O'BRIEN
P.O. Box 27083
Cincinnati, Ohio 45227

CHARLES H. BENDIG
Wilcox & Schlosser Co.
4937 West Broad Street
Columbus, Ohio 43228
(614) 878-7251

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. _____

CHARLES WILLIAM O'BRIEN, Petitioner

v.

WILCOX & SCHLOSSER CO., L.P.A., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

The petitioner, Charles William O'Brien, respectfully prays that a Petition for Certiorari issue to review the judgment and opinion of the State of Ohio Supreme Court entered in this proceeding on February 23, 1983.

OPINION BELOW

The opinion of the Supreme Court of Ohio appears in the appendix hereto. The opinions of the Franklin County Court of Appeals and of the Franklin County Common Pleas Court are similarly appended.

JURISDICTION

The judgment of the Ohio Supreme Court was entered on February 23, 1983. This petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Whether an attorney who is liable for a claim of malpractice may, by his intentional acts, avoid the consequences of said malpractice by:

a. Deliberately bringing a claim for fees outside the one year Statute of Limitations specifically calculated to deprive the opposing side from bringing a counterclaim to the action in violation of the rules governing the Courts of Ohio, Canon 6, Disciplinary Rule DR6-102: "A lawyer shall not attempt to exonerate himself or limit his liability to his client for his personal malpractice."

b. Deliberately changing their operative legal name and status without corresponding changes to letterheads and billing notices thereby depriving clients of true knowledge

as to what entity they are dealing with for the purpose of malpractice or other claims in violation of the rules governing the Courts of Ohio, Canon 2, Disciplinary Rule DR2-102: "A lawyer shall not use misleading, incorrect or deceptive letterheads, operate under ficticious names or hold himself out to the public as a partnership when none exists."

2. Whether the Statute of Limitations relating to attorney malpractice under ORC 2305.11 applies when the attorney commits an illegal, fraudulent and intentional deprivation and retention of his client's paid-for files; and whether the illegal retention and conversion of files by an attorney constitutes a continuing action for malpractice even though the attorney/client relationship ended in excess of one year prior to the action of the attorney for fees; and whether it would be a denial of equal protection of the laws under the Fourteenth Amendment of the United States Constitution if the attorney were able to invoke his one year Statute of Limitations for malpractice and by so doing, deny his client the right to bring an action for

fraud or conversion which have longer Statutes of Limitations.

3. Whether an attorney may change his operative name, assume accounts receivable of his predecessor and blunt his client's ability to establish a cross demand or recoupment for malpractice.

STATUTORY PROVISIONS INVOLVED

United States Constitution
14th Amendment

> 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case originated October 11, 1979, in the Franklin County Municipal Court, Columbus, Ohio, between plaintiff-appellee, Wilcox & Schlosser Co., L.P.A. against defendant-appellant, Charles William O'Brien, (O'Brien). The complaint alleged that O'Brien was indebted to the law

firm for unpaid legal fees rendered by one of its predecessors in interest, Wilcox, Schlosser and Mirras, a general partnership law firm.

Along with his answer of November 19, 1979, O'Brien filed a counterclaim which alleged that Wilcox and Schlosser Co., L.P.A. (together with Jacob A. Schlosser and Robert A. Wilcox) did the following:

> 1. That plaintiff-appellee undertook several projects on behalf of defendant-appellant at an hourly rate and a flat rate; that this "agreement" was breached by plaintiff-appellee, resulting in $15,271.61 damages to defendant-appellant.
>
> 2. Plaintiff-appellee undertook representation in case no. 73-CV-05-1521 known as "the first amendment case" and was paid, but misplaced or lost or converted the case file, by reason of which defendant-appellant was damaged to the extent of $7,500.00. O'Brien demanded compensatory and punitive damage relief in the total amount of $230,271.61.

The case was ultimately transferred to

the Franklin County Common Pleas Court where it was assigned case No. 79CV-1-26200. On July 27, 1981, a jury trial was held wherein plaintiff-appellee was permitted to make a last minute amendment as to the real party plaintiff. Three days thereafter, a $3,500.00 verdict was returned in favor of plaintiff-appellee. On January 19, 1982, O'Brien filed his appeal brief in the Court of Appeals, Franklin County, Ohio, Tenth Appellate District. One of the assignments of error regarded O'Brien's counter-claim for malpractice and the denial by the trial court to hear this claim by virtue of plaintiff-appellee's motion for a directed verdict based on the one year Statute of Limitations for malpractice. O'Brien was denied the ability to prove malpractice and seek additional damages for fraud and conversion. The trial court, in its instructions to the jury, directed that defendant-appellant was liable to plaintiff-appellee in a sum not less than $1,500.00, an amount that O'Brien testified was the flat-fee agreement which was the subject matter of the trial case.

O'Brien first retained the law firm of Wilcox and Schlosser as it was then known in 1968 or 1969. The firm and particularly Jacob Schlosser from that time until 1978, allegedly handled much of O'Brien's legal matters. At no time during this period was O'Brien informed of a change in the legal entity with whom he was dealing. On November 7, 1975, O'Brien met with Schlosser concerning the Meadows case whereby O'Brien was seeking representation for defense in the Meadows trial. At that meeting a flat fee of $1,500.00 was stipulated. Schlosser claimed that no mention was made of fees which was an admitted violation of applicable disciplinary rules.

O'Brien was billed in December, 1975, in the amount of $5,160.00 and in January, 1976, denied owing that much. A continuing dispute arose between O'Brien and Schlosser culminating in the initial law suit.

In the course of approximately the next two and a half years, Schlosser continued working for O'Brien, specifically on the Greenberg and Big Bear cases. The dispute as to the

unpaid Meadows bill continued: O'Brien was being billed at an hourly rate by Schlosser and a letter dated September 14, 1977, threatened suit if the Meadows bill was not paid.

Schlosser had retained a file, the first amendment case, which O'Brien had paid for prior to the Meadows case and demanded possession of, so that ongoing work could be done on that file by another attorney. Schlosser refused to surrender the file on nebulous grounds ranging from: "he couldn't find it, it was destroyed, O'Brien had failed to pay the Meadows bill." Relationships between Schlosser and O'Brien were very much unsettled and allegedly the attorney/client relationship terminated in May of 1978. However, up until the last day of the trial at the Common Pleas level Schlosser had denied O'Brien access to the first amendment file. In August, 1979, approximately one and one-half years after the relationship had terminated and approximately four years after the claim for services arose, Schlosser, et al, filed a complaint claiming unpaid attorney's fees of $5,160.00. During the trial the

following evidence was introduced: There was no fee agreement in the Meadows case; Jake Schlosser testified that there was no specific discussion as to fees and that there was no discussion whatsoever as to what would be charged for law clerk work. Mr. Schlosser further testified that the number of hours related to Luke Meadows case differed depending on which ledger you look at. Fifty-six hours if you look at the black book which "is the most reliable accounting", ninety-six hours if you look at Mike Schaeffer's hand-written accounting. The black book ledger also showed that O'Brien was billed two and a half hours time at $50.00 an hour for preparation of the bill although it was not the firm's policy to charge for preparation of statements. As the trial progressed, Charles Schneider, an attorney at law in the State of Ohio, indicated that, as a previous associate of Mr. Schlosser, Mr. Schlosser had told him to double the bill on one of his clients over and above the number of hours actually expended.

Mr. Schlosser used erroneous letterheads

with the name Wilcox, Schlosser and Schneider after October of 1975 even though Mr. Larry Schneider had left the firm. Again in February of 1977, Schlosser's firm was using a letterhead that didn't truly reflect the name of the firm. They were using the name of Wilcox, Schlosser and Schneider when in fact the true name of the firm was Wilcox, Schlosser and Mirras. Hence Mr. O'Brien was billed under a ficticious name by a law firm that really did not exist in fact. Mr. Schlosser further testified that over a period of eighteen years that he was associated with Mr. Wilcox the firm changed in character. That he had various associated attorneys and various partner attorneys over that period of time. In 1962 the firm was called Wilcox and Schlosser. In 1972 the firm changed to the name of Wilcox, Schlosser and Schneider with Larry Schneider being an additional partner. In August of 1975, Mr. Schneider left to start his own practice in Marysville. At that time, Thomas J. Mirras was an associate with the firm and he was brought on as a partner and the firm name was changed to Wilcox, Schlosser and Mirras

in August of 1975. It continued under that form until March 1, 1978, at which time Mr. Mirras left, whereupon the firm reverted to the name of Wilcox and Schlosser for a period of two months. Subsequently, the firm transferred its assets to a professional corporation called Wilcox and Schlosser Co., L.P.A., an Ohio professional association. On May 1, 1980, the name was changed to Wilcox, Schlosser and Bendig Co., L.P.A. Mr. Schlosser testified there were never any partners in the firm other than himself, Wilcox, Schneider and Mirras, that there was never any written partnership agreement, "it was simply a general partnership". When Mr. Schneider and later Mr. Mirras were later brought into the partnership, no transfers in partnership assets were made. Neither Mr. Schneider or Mr. Mirras had any ownership of the partnership assets and therefore did not take any assets with them when they left the firm. During this period of time, Robert Wilcox owned all the assets in that he had all of the ownership of the capital accounts of the partnership. Mr. Schlosser had a zero capital

account as did Mr. Schneider and Mr. Mirras. At the time of the incorporation of the practice, Mr. Wilcox and Mr. Schlosser were the only partners and Mr. Wilcox was the owner of all the capital accounts. At the time of incorporation, there was a bill of sale wherein Mr. Wilcox transferred all his assets to the corporation among which is noted all accounts receivable and work in progress. Mr. Schlosser is now the president of the corporation and sole stockholder and owner of the law firm. Mr. Wilcox has no current ownership in the firm.

During the trial it was discovered that during the dispute over the Meadows bill, Mr. Schlosser handled a personal injury case styled Charles William O'Brien vs. Big Bear wherein Mr. Schlosser's conflict of interest resulted in the ultimate dismissal of the case to the prejudice of the client. A second case, styled Greenberg vs. College Town Management, was similarly mishandled where Mr. Schlosser, after being cautioned against further representation, personally appeared before a judge to secure a judgment against his own client, O'Brien. The

third and perhaps most interesting violation of the attorney/client relationship was in a case that O'Brien argued successfully before the Ohio Supreme Court. Mr. Schlosser was paid in full for this case previously identified as the "first amendment case" but the file and documents therein were kept from Mr. O'Brien for a number of reasons, none legal, to force O'Brien to pay for the contested Meadows case. In Mr. Schlosser's deposition, he stated that he found the first amendment file in a barn owned by Bob Wilcox's father the night prior to attending the pre-trial deposition. At the trial Schlosser stated that the file was found in one of the top drawers of his office and then recanted to the deposition version. After several years of request for this file as the main issues in the case were not ultimately decided until 1981, Mr. Schlosser found it in one of his file cabinets an hour before the deposition and even then did not return it until after the trial in which he sued O'Brien for fees unrelated to that particular case. In Mr. Schlosser's own testimony he indicated that

his primary recollection was that the file was not returned because it could not be found but that his recollection was unclear as to whether it was not returned because of the unpaid fee in the Meadows case. He stated further that it was very possible that he told O'Brien that he would not return the file even though the fee was paid on it until the situation regarding the Meadows case was resolved. He further stated that his firm continued to work for O'Brien for almost two years after the last date of the Meadows bill or from April, 1976, to March, 1978. He did not bring suit for fees until one and one-half years later for no other reason than "to give O'Brien time to pay the Meadows bill". Mr. Schlosser further testified that Mr. O'Brien paid him in full for the first amendment file. It was a flat fee case. "I had no legal right to keep the file from O'Brien, but I did it nonetheless." "It was permanently mislaid, or so I thought." "It was either permanently mislaid or destroyed." Mr. Schlosser further acknowledged that during the year 1977 there was an ongoing dispute with Mr. O'Brien regarding

the fees owed in the Meadows case and during this time he was still counsel of record in the Greenberg and Big Bear case. The facts of this case are clear. As to the Meadows case, Mr. Schlosser failed to discuss fees particularly when the value of the services should have been weighed against the settlement potential of the case. Schlosser further withheld paid-for files relating to ongoing cases as a sort of blackmail for disputed fees. Schlosser held himself out as a partnership when the proclaimed partnership did not exist. And finally, Schlosser failed to withdraw from other cases when the Meadows fee dispute was ongoing and when there was little doubt that Schlosser's personal conflict adversely affected those cases. Yet the trial court used the one year Statute of Limitations for malpractice to deny O'Brien his right to pursue these various issues as a counterclaim or a defense.

The Court of Appeals in upholding the trial verdict on September 23, 1982, indicated that any and all affirmative counterclaims by O'Brien were barred by the Statute of Limitations, and that the only remaining question was whether

O'Brien should have been allowed to assert the plaintiff's malpractice, not as a claim but as a defense. Because of plaintiff-appellee's changes in name, the Court decided that the defense of malpractice was based upon a transaction between plaintiff-appellee's predecessor and O'Brien that was not the basis of the claim for attorney's fees. As such, the Court of Appeals reasoned that being based on an unrelated matter, the counterclaim did not constitute a defense to the actions for attorney's fees were granted. The Court of Appeals ignored the issue as to whether plaintiff-appellee's illegal retention of O'Brien's ongoing case files extended the Statute of Limitations or estopped its application. The Appellate Court was upholding this scenario: Plaintiff-Appellee amends its complaint as to the real parties and interest on the day of trial thereby precluding defendant-appellant's ability to effectively counterclaim or raise recoupment defenses.

REASON FOR GRANTING WRIT

It is respectfully submitted that the foregoing issues are of great interest and

importance to the citizens of the United States. This case brings to light one of the most sensitive and important concerns of the general public: That being the necessity of maintaining an ethical relationship by the attorney towards his client.

In this decade when the general public is apt to rely more and more on the trusted advice of counsel, this Court may very well wish to decide how attorneys are to handle the public trust and begin to incorporate the Codes of Professional Responsibility into law in order to control the conduct of attorneys who use their legal knowledge to subvert the law and take advantage of their clients. This case presents a perfect opportunity for this Court to review how these codes affect not just the disciplinary setting and principle, but rather, as these codes actually interact with cases presented to trial courts. This case is larger than the evidentiary issues presented in the trial court -- it goes to the heart of what makes the legal system -- the absolute trust between the lawyer and his client. Today there are too many

attorneys with the misguided goal of their monetary interests as opposed to their client's well-being, notwithstanding that many of today's attorneys either misrepresent or are not adequately qualified to represent their clients in court. It is submitted that the Statement of the Case embraces the reprehensible conduct of attorneys who outmaneuver their clients, denying them due process and ultimately creating deprivations under the Fourteenth Amendment of the United States Constitution.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ohio Supreme Court, the Franklin County Court of Appeals and the Franklin County Common Pleas Court as the decisions and opinion represent such a significant departure from due process as to call for an exercise of this Court's power of supervision.

Respectfully submitted,



Charles William O'Brien
P.O. Box 27083
Cincinnati, Ohio 45227

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,	1983 TERM
City of Columbus	To wit: February 23, 1983
Wilcox & Schlosser Co. L.P.A.	No. 82-1850
Appellee,	MOTION FOR AN ORDER DIRECTING THE COURT OF
vs.	APPEALS
Charles William O'Brien,	for Franklin County
Appellant.	TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Charles Wm. O'Brien.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ____ day of _____ 19____

_____Clerk

IN THE COURT OF APPEALS FOR

FRANKLIN COUNTY, COLUMBUS, OHIO

Wilcox and Schlosser,

Plaintiff-Appellee,

v. No. 81Ap-788

Charles William O'Brien,

Defendant-Appellant.

O P I N I O N

Rendered on Spetember 23, 1983

WILCOX, SCHLOSSER & BENDIG CO., L.P.A.,
MR. CHARLES H. BENDIG,
4937 West Broad Street,
Columbus, Ohio 43228,
For Plaintiff-Appellee.

MR. CHARLES WILLIAM O'BRIEN
P.O. Box 09654
Columbus, Ohio 43209
Pro se.

McCORMAC, J.

On August 22, 1979, plaintiff-appellee, Wilcox & Schlosser Co., L.P.A., commenced this cause of action against defendant-appellant, Charles William O'Brien, for unpaid legal fees rendered by a predecessor-in-interest, Wilcox, Schlosser & Mirras, a general partnership law firm. Defendant answered and counterclaimed

for malpractice.

The Court also directed a verdict against defendant on the malpractice counterclaim for the reason that it was barred by the statute of limitations. The last professional contact any attorney connected with plaintiff or a predecessor had with defendant was in March or April of 1978, well over one year prior to the commencement of this suit on August 22, 1979. The jury rendered a verdict for attorney fees for plaintiff in the amount of $3,350.

Defendant has appealed alleging two assignments of error, as follows: (one assignment of error is relevant to the case at bar)

> "The trial court committed error in granting plaintiff's motion for a directed verdict on defendant's counterclaim in that the statute of limitations did not apply to the factual situation before the court."

With respect to defendant's second assignment of error, R. C. 2305.11 barred the malpractice claim that defendant asserted as a counterclaim against plaintiff. The attorney-client relationship between defendant and plaintiff's predecessors terminated early in

1978. Plaintiff's attorney fee claim was not commenced until 16 months thereafter. Thus, the one year limitation in R.C. 2305.11 operated to preclude defendant from bringing any malpractice action against plaintiff as the counterclaim was barred before plaintiff's claim was commenced. See Conway v. Ogier (1961), 115 Ohio App. 251. Counterclaims include all affirmative claims whether historically known as recoupment, set-off or cross-petition. They include any claims upon which affirmative relief could be granted.

Although the statute of limitations barred defendant from bringing an affirmative claim of malpractice, thereby justifying the dismissal of his counterclaim, a remaining question is whether the defendant should have been allowed to assert the plaintiff's malpractice, not as a claim, but as a defense.

In Conway, the court indicated that the affirmative malpractice claim which was barred at the time plaintiff's account action for fees was commenced was only usable for defensive

purposes to the extent that it constituted an allegation of non-performance or defective performance of the services for which reimbursement was sought in the complaint. To that extent, the court held that it was a true defense and not affected by the bar of the statute of limitations. The Conway holding is in accordance with the general principle of law that the statute of limitations may be used to bar affirmative actions but not to suppress or deny matters of defense to the claim against which the counterclaim was asserted.

It is necessary to first determine whether defendant's counterclaim contained within it a defense to the action for unpaid attorney fees of plaintiff. If there was an assertion in the counterclaim which contested the basis of plaintiff's claim that he properly rendered attorney services for which payment was not made, then defendant should have been permited to defend on that basis. If on the other hand, the counterclaim was based upon a different transaction, it would, of course, not be a defense to the claim for attorney fees that was

asserted and could not be used for defensive purposes.

Defendant filed both an answer and a counterclaim. In his answer, defendant asserted several defenses, including accord and satisfaction, negligence, failure of consideration and fraud.

From the record it would appear that the counterclaim of malpractice was based upon a transaction between plaintiff's predecessor and defendant that was not the basis of the claim for attorney fees. If so, being based upon an unrelated matter, it did not constitute a defense to the action for which attorney fees were granted.

Moreover, the record does not demonstrate that the trial court denied defendant an opportunity to introduce evidence that the attorney services for which judgment was rendered were defectively rendered or were not worth what was claimed. Defendant's primary defense was that he owed only $15,00 based upon an express agreement, which the attorney denied. He was allowed to fully explore that claim. Defendant was not denied any opportunity to prove that the attorney

services for which payment was sought were defectively rendered or owth less than claimed. There was no denial of truly defensive testimony.

Defendant's second assignment of error is overruled.

Defendant's assignments of error are overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

REILLY and MOYER, JJ., concur.

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Wilcox & Schlosser Co., L.P.A. Case No. 79CV-12-6200

Plaintiff,

vs.

Charles William O'Brien Judge Reda

Defendant.

JOURNAL ENTRY

This action came on for trial before the Court and a jury; and, the Court, on motion of the Plaintiff, directed a verdict in favor of Plaintiff against Defendant with regard to Defendant's Counter-Claim, whereupon it is hereby ORDERED that Defendant's Counter-Claim is dismissed.

With respect to the issues presented by the Amended Complaint, said issues having been presented to the jury and the jury having returned its verdict, it is ORDERED that Plaintiff recover from Defendant the sum of $3,350.00 (with interest at the rate of six percent per annum on the sum of $15,00.00 commencing thirty days after December 18, 1975 until July 30, 1980 and thereafter at the rate of eight percent per annum (pursuant to Ohio Revised Code ¶1343.03)], and

it is ORDERED that Defendant pay the costs of this action.

Dated at Columbus, Ohio, August 18, 1981.

Judge Frank A. Reda

APPROVED:

WILCOX, SCHLOSSER & BENDIG CO., L.P.A.

By _____
Charles H. Bendig (BEN20)
Attorney for Plaintiff
4937 West Broad Street
Columbus, Ohio 43228
(614) 878-7251

_____
Ralph F. Pariser (PAR11)
Attorney for Defendant
141 East Livingston Avenue
Columbus, Ohio 43215
(614) 224-4004